

STATE OF MICHIGAN
COURT OF APPEALS

In re MANUEL J. MOROUN and DAN
STAMPER.

MICHIGAN DEPARTMENT OF
TRANSPORTATION,

Plaintiff-Appellee,

v

DETROIT INTERNATIONAL BRIDGE
COMPANY and SAFECO INSURANCE
COMPANY OF AMERICA,

Defendants,

and

MANUEL J. MOROUN and DAN STAMPER,

Appellants.

FOR PUBLICATION
February 6, 2012

No. 308053
Wayne Circuit Court
LC No. 09-015581-CK

Advance Sheets Version

Before: WILDER, P.J., and K. F. KELLY and FORT HOOD, JJ.

FORT HOOD, J. (*concurring in part and dissenting in part*).

I join in and concur with the lead opinion in all respects except concerning the imprisonment sanction.¹ Because I conclude that the trial court did not abuse its discretion with regard to the propriety of the penalty for civil contempt, I would affirm the lower court's decision in its entirety.

¹ With regard to appellants' contention that they were unaware that they could be imprisoned for the contempt of DIBC, I would only add that a party cannot claim lack of notice when the assertion is belied by the pleadings it has filed in the case. See *DeGeorge v Warheit*, 276 Mich App 587, 592-593; 741 NW2d 384 (2007).

Individuals who conspire with others to violate court orders are equally liable and subject to contempt proceedings. *ARA Chuckwagon of Detroit, Inc v Lobert*, 69 Mich App 151, 159; 244 NW2d 393 (1976). When an order is entered by the court, it must be obeyed until it is judicially vacated. *Id.* at 161. The validity of the order is determined by the courts, not the parties. *Id.* “Our jurisprudence has long recognized the inherent power of a court of record to punish, by contempt citation, a party for wilful, continuous, and contemptuous disobedience of its orders.” *Id.* at 162-163.

The circuit court has the authority to punish by fine or imprisonment, or both, any neglect, violation of duty, or misconduct by “[p]arties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court.” MCL 600.1701(g). Contempt committed outside the immediate view and presence of the court may be punished by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit or other means and an opportunity to defend has been given. MCL 600.1711(2). MCL 600.1715² addresses the punishment of contempt:

(1) Except as otherwise provided by law, punishment for contempt may be a fine of not more than \$7,500.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 93 days, or both, in the discretion of the court. . . .

(2) If the contempt consists of the omission to perform some act or duty that is still within the power of the person to perform, the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty, which shall be specified in the order of commitment, and pays the fine, costs, and expenses of the proceedings, which shall be specified in the order of commitment.

“The issuance of an order of contempt rests in the sound discretion of the trial court and is reviewed only for an abuse of discretion.” *In re Contempt of Henry*, 282 Mich App 656, 671; 765 NW2d 44 (2009). “We review for an abuse of discretion a trial court’s decision to hold a party or individual in contempt.” *In re Contempt of Dudzinski*, 257 Mich App 96, 99; 667 NW2d 68 (2003). The trial court’s factual findings are reviewed for clear error, and questions of law are reviewed de novo. *Porter v Porter*, 285 Mich App 450, 454-455; 776 NW2d 377 (2009). “Clear error exists when this Court is left with the definite and firm conviction that a mistake was made.” *Henry*, 282 Mich App at 669. “The abuse of discretion standard recognizes that

² Issues involving statutory interpretation present questions of law reviewed de novo. *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011). “The primary goal of statutory interpretation is to give effect to the intent of the Legislature.” *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). To determine the legislative intent, the court must first examine the statute’s plain language. *Klooster*, 488 Mich at 296. If the language of the statute is clear and unambiguous, it is presumed that the Legislature intended the meaning plainly expressed in the statute. *Briggs*, 485 Mich at 76.

there will be circumstances where there is no single correct outcome and which require us to defer to the trial court's judgment; reversal is warranted only when the trial court's decision is outside the range of principled outcomes." *Porter*, 285 Mich App at 455.

"The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal, allowing it to punish past transgressions, compel future adherence to the rules of engagement, i.e., the court rules and court orders, or compensate the complainant." *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 708; 624 NW2d 443 (2000).

[W]e define[] contempt of court as a willful act, omission, or statement that tends to . . . impede the functioning of a court. . . . [T]he primary purpose of the contempt power is to preserve the effectiveness and sustain the power of the courts. Because the power to hold a party in contempt is so great, it carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown. [*Id.* (quotation marks and citations omitted).]

"Civil contempt proceedings seek compliance through the imposition of sanctions of indefinite duration, terminable upon the contemnor's compliance or inability to comply." *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007). Criminal contempt, however, is designed to punish past disobedient conduct by imposing an unconditional and definite sentence. *Id.* Although civil contempt is primarily coercive in nature to compel compliance by the contemnor, the civil sanction may also have a punitive effect. *Id.* Confinement or imprisonment may be imposed whether the contempt is civil or criminal in nature. *Borden v Borden*, 67 Mich App 45, 48; 239 NW2d 757 (1976).

Civil contempt imposes a term of imprisonment which ceases when defendant complies with the court's order or when it is no longer within his power to comply. Civil contempt seeks to coerce compliance, to coerce the defendant to do what he is able to do but refuses to do. The defendant carries the keys to his prison in his own pocket. Criminal contempt, on the other hand, imposes a definite term of imprisonment as punishment for a past offense. [*Id.*]

Contempts are not necessarily wholly civil or altogether criminal because it is not always easy to classify a particular act as belonging to either class. *Gompers v Buck's Stove & Range Co*, 221 US 418, 441; 31 S Ct 492; 55 L Ed 797 (1911). The *Gompers* Court offered the following test to determine the character of the punishment and held that any indirect overlapping consequences did not alter the nature of the contempt:

It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the

defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

* * *

It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*. [*Id.* at 441-443.]

Similarly, Michigan law provides that when conditional and coercive confinement is imposed, the contempt proceeding is civil. *Borden*, 67 Mich App at 49. Michigan statutes also hold that a "commitment to coerce performance may properly continue so long as it is within the power of the contemnor to comply with the court order." *Id.*; see also MCL 600.1715.

Furthermore, Michigan law recognizes two types of civil contempt sanctions, coercive and compensatory. *In re Contempt of Rochlin*, 186 Mich App 639, 646; 465 NW2d 388 (1990). In *United States v United Mine Workers of America*, 330 US 258, 304; 67 S Ct 677; 91 L Ed 884 (1947), the United States Supreme Court explained the underlying rationale behind the two types of civil contempt sanctions:

Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent on the outcome of the basic controversy.

But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired. [Citations omitted.]

The longstanding rule is that "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *United States v Rylander*, 460 US 752, 756; 103 S Ct 1548; 75 L Ed 2d 521 (1983) (quotation marks and citation omitted). "Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required." *Int'l Union, United Mine Workers of America v Bagwell*, 512 US 821, 831; 114 S Ct

2552; 129 L Ed 2d 642 (1994). Consequently, civil contempt “may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.” *Id.* at 827. Due process does not require a full-blown evidentiary hearing, and contempt sanctions may even be imposed on the basis of uncontroverted affidavits. *United States v Ayres*, 166 F3d 991, 995 (CA 9, 1999); see also MCL 600.1711(2).

The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance. Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus carries the keys of his prison in his own pocket. [*Bagwell*, 512 US at 828 (quotation marks and citations omitted).]

When civil contempt occurs, the trial court has inherent and statutory authority to order conditional imprisonment. *Harvey v Lewis*, 10 Mich App 709, 717; 160 NW2d 391 (1968). “Theoretically, imprisonment for civil contempt might be *forever* so long as it is within the contemnor’s power to comply with the court order he refuses to carry out[.]” *Id.* (emphasis added). The determination regarding the propriety of contempt is contingent on the facts and circumstances of the individual case. See *Spallone v United States*, 493 US 265, 267, 279-280; 110 S Ct 625; 107 L Ed 2d 644 (1990); *In re Simmons*, 248 Mich 297, 305-306; 226 NW 907 (1929); *Stowe v Wolverine Metal Specialties Co*, 242 Mich 624, 630; 219 NW 714 (1928); *Wells v Wells*, 144 Mich App 722, 732; 375 NW2d 800 (1985). When selecting the appropriate contempt sanction, the court must use the least possible power necessary to achieve the proposed end. *Spallone*, 493 US at 276. However, if the least possible contempt sanction approach fails to produce compliance within a reasonable period of time, additional sanctions may be imposed. *Id.* at 280.

Because the objective of civil contempt is to enforce compliance with the court’s order rather than punishment for a refusal to obey, one held in and incarcerated for civil contempt may not be incarcerated beyond the time that he or she is able to comply with the court’s order. *Spalter v Wayne Circuit Judge*, 35 Mich App 156, 161; 192 NW2d 347 (1971). “The contemnor must have the ability to comply with the court’s order and the possibility of terminating his or her confinement and purging himself of contempt by complying.” *Borden*, 67 Mich App at 49. “Promised future compliance with prior judicial orders is a common and appropriate method of purging contempt. Since future compliance is the court’s objective in civil contempt proceedings, an assurance of such compliance by one deemed worthy of belief is a sensible basis for terminating coercive sanctions.” *Williams Int’l Corp v Smith*, 144 Mich App 257, 266; 375 NW2d 408 (1985) (citations omitted), rev’d on other grounds 429 Mich 81 (1987). The court is vested with broad discretion to determine the appropriate conditions through which the contemnor may purge the contempt. *Midlarsky v D’Urso*, 133 AD2d 616; 519 NYS2d 724 (1987). The appellate court reviews the denial of a motion to purge a contempt order for an abuse of discretion. *Consolidated Rail Corp v Yashinsky*, 170 F3d 591, 594 (CA 6, 1999).

Appellants contend that because the completion of the project will take approximately 9 to 12 months, do not have the ability to “immediately” purge the contempt and, therefore, do not have the keys to their jail cell. Appellants further contend that the trial court was obligated to impose the least restrictive sanction to compel compliance. Curiously, appellants fail to identify the least restrictive sanction or impetus that would prompt them into action on behalf of DIBC.³

As indicated, the propriety of the contempt sanction is contingent on the facts and circumstances in each individual case, and although the least restrictive sanction should be imposed, a graduated penalty is appropriate when necessary. See *Spallone*, 493 US at 276, 280; *Wells*, 144 Mich App at 732. The trial court is granted the broad discretion to determine the appropriate conditions through which the contemnor may purge the contempt. *Midlarsky*, 133 AD2d at 617. Pursuant to Michigan caselaw, full compliance with the contempt order is not necessarily required; rather, a promise of future compliance or a good-faith attempt may be sufficient to purge the contempt. *Williams Int’l Corp*, 144 Mich App at 266.

In the present case, the facts and circumstances justified the order of confinement pending completion of the Ambassador Bridge Gateway Project. The extensive and lengthy record demonstrates that the trial court ordered completion of the project. Rather, than comply with the trial court’s order, DIBC filed multiple claims of appeal, and the case was removed to federal court on two occasions. DIBC did not obtain any relief from the trial court’s order,⁴ but nonetheless failed to comply with that order. Unable to obtain compliance, the trial court held a contempt hearing during which Stamper testified. The trial court determined that civil coercive sanctions were necessary to ensure compliance, and Stamper, as president of DIBC, was ordered imprisoned but was released within a short time when DIBC restarted work on the project. However, since then, DIBC has not complied with the trial court’s order. This order has not been declared invalid, and, consequently, the trial court has inherit contempt power to punish the willful, continuous, and contemptuous disobedience of the order. *ARA Chuckwagon*, 69 Mich App at 162-163. Although the court has the obligation to consider the least restrictive penalty, in the present case, the court graduated its punishment in light of the history of delay and noncompliance. Under the circumstances, I cannot conclude that ordering the contempt sanction until completion of the project constituted an abuse of discretion.

Furthermore, the contention that appellants are without the means or the knowledge to immediately purge the contempt is without merit. The design of coercive civil contempt

³ Our order granting a stay of the lower court’s decision only applied to appellants’ imprisonment, and there was no stay of the payment of fines or the ordered completion of the Ambassador Bridge Gateway Project in accordance with the February 1, 2010, order of the trial court. When questioned at oral argument about the progress with regard to the remainder of the trial court’s order, counsel for appellants answered that there was the mere filing of the claim of appeal. During rebuttal, cocounsel asserted that they had submitted plans, but they were refused.

⁴ The federal court concluded that DIBC had engaged in “the most creative schemes and maneuvers to delay compliance with a court order.” *Mason and Dixon Lines, Inc v Steudle*, 761 F Supp 2d 611, 628 (ED Mich, 2011) (quotation marks and citation omitted).

sanctions is to achieve compliance, to force the contemnor to do what he or she refuses to do. *Borden*, 67 Mich App at 48. “Civil contempt proceedings seek compliance through the imposition of sanctions of *indefinite* duration, terminable upon the contemnor’s compliance or inability to comply.” *DeGeorge*, 276 Mich App at 592 (emphasis added). “The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal, allowing it to punish past transgressions, compel future adherence to the rules of engagement, i.e., the court rules and court orders, or compensate the complainant.” *Auto Club*, 243 Mich App at 708. DIBC’s conduct rose to the height of contempt. According to the factual findings of the trial court, it not only failed to comply with the trial court’s order, but engaged in a process designed to render the project stagnant. This comes at a great cost to MDOT as well as the local community where the construction commenced, and the trial court must be entitled to use the ultimate sanction within its arsenal. *Id.* However, appellants have the right to move the trial court to purge the contempt, *Spalter*, 35 Mich App at 166, and can be released before the full completion by promises of future compliance or good faith efforts, *Williams Int’l Corp*, 144 Mich App at 266. In light of the fact that appellants can purge the contempt before the full completion of the project, I cannot conclude that the trial court’s decision regarding the imprisonment constituted an abuse of discretion.

I would affirm the lower court’s order in its entirety.

/s/ Karen M. Fort Hood